UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/364,375	07/30/1999	RONEN CHAYAT	ITL.0151US (P6593)	9363

21906   7590   12/14/2009
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EXAMINER
AUGUSTIN, EVENS J

ART UNIT	PAPER NUMBER
3621	

MAIL DATE	DELIVERY MODE
12/14/2009	PAPER

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22   DECISION ON APPEAL
23

1   STATEMENT OF THE CASE

2   Ronen Chayat (Appellant) seeks review under 35 U.S.C. § 134 (2002) of

3   a final rejection of claims 1-4, 6-15, 17-26, and 28-30, the only claims

4   pending in the application on appeal.

5   We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b)

6   (2002).

7   SUMMARY OF DECISION[1]

8   We AFFIRM.

9   THE INVENTION

10   The Appellant invented a method and apparatus for selectively

11   transmitting one type of packet ahead of another in a computer system

12   (Specification 1:2-3).

13   An understanding of the invention can be derived from a reading of

14   exemplary claims 1, which is reproduced below [bracketed matter and some

15   paragraphing added].

_____

[1] Our decision will make reference to the Appellant's Appeal Brief ("App.
Br.," filed December 21, 2007) and the Examiner's Answer ("Ans.," mailed
March 24, 2008), and Final Rejection ("Final Rej.," mailed November 1,
2007).

2

1   1. A method for use with a computer system, comprising:

2   [1]   receiving packets of at least two types;

3   [2]   determining which type of packet takes more time to
4   process;

5   [3]   identifying a packet of a first type that takes more time to
6   process;

7   [4]   identifying a packet of a second type that takes less time
8   to process; and

9   [5]   transmitting packets of the second type before packets of
10   the first type.

11

12   THE REJECTIONS[2]

13   The Examiner relies upon the following prior art:

Cidon et al.   US 5,343,473   Aug. 30, 1994

Taniguchi   US 6,222,841   Apr. 24, 2001

14

15   Claims 1-4, 6-15, 17-26, and 28-30 stand rejected under 35 U.S.C.
16   § 103(a) as unpatentable over Cidon and Taniguchi.

17

18   ISSUES

19   The issue pertinent to this appeal is whether the Appellant has sustained
20   the burden of showing that the Examiner erred in rejecting claims 1-4, 6-15,
21   17-26, and 28-30 under 35 U.S.C. § 103(a) as unpatentable over Cidon and
22   Taniguchi. This pertinent issue turns on whether Cidon and Taniguchi

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[2] The Examiner has withdrawn the previously asserted 35 U.S.C. § 112,
second paragraph, rejection (Ans. 4).

1   determine which of two types of packets takes more time to process and

2   transmitting the packet that does not take more time to process first.

3

4   FACTS PERTINENT TO THE ISSUES

5   The following enumerated Findings of Fact (FF) are believed to be

6   supported by a preponderance of the evidence.

7   *Facts Related to the Prior Art*

8   *Cidon*

9   01.   Cidon is directed to data communications network having the

10   capability of processing both high priority packets and low

11   priority packets using a prempt/resume protocol (Cidon 1:7-11).

12   02.   Cidon describes a preemptive protocol that requires that a high-

13   priority packet preempts the transmission of a low-priority packet

14   (Cidon 4:5-30 and 8:12-15).

15   *Taniguchi*

16   03.   Taniguchi is directed to a data transmission system and method

17   that processes real-time data such as video data, audio data, and

18   the like as packet stream data (Taniguchi 1:5-7).

19   04.   Taniguchi describes assigning a priority to packets to determine

20   which packets are to be transmitted and which packets are

21   abandoned (Taniguchi 16:16-32). Priority levels are assigned to

22   the packets ranging from 0x00 to 0xFF, from small to large

23   (Taniguchi 18:23-32). The smaller a packet value, the higher the

1 packet priority (Taniguchi 18:23-32). In other words, the 0x00

2 priority is the highest priority and is always transmitted

3 (Taniguchi 18:23-32). Taniguchi further describes that a

4 discriminatory boundary level can be set, where a packet having a

5 smaller value (higher priority) than the boundary level is

6 determined to be transmitted (Taniguchi 18:62-67). Packets with

7 a priority of the same value as the discrimination boundary level

8 are subjected to filtering discrimination on the basis of their

9 packet sizes, the number of transmitted bytes, and the value Bpc

10 (Taniguchi 19:1-7). Even when packets with higher priority are

11 transmitted, confirmation processing is executed based on their

12 packet sizes, the number of transmitted bytes, and the value Bpc

13 (Taniguchi 19:13-17).

14 *Facts Related To The Level Of Skill In The Art*

15 05. Neither the Examiner nor the Appellant has addressed the level

16 of ordinary skill in the pertinent arts of networking and data

17 transmission protocols. We will therefore consider the cited prior

18 art as representative of the level of ordinary skill in the art. *See*

19 *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001)

20 ("[T]he absence of specific findings on the level of skill in the art

21 does not give rise to reversible error 'where the prior art itself

22 reflects an appropriate level and a need for testimony is not

23 shown'") (quoting *Litton Indus. Prods., Inc. v. Solid State Sys.*

24 *Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985).

25

1   *Facts Related To Secondary Considerations*

2   06.   There is no evidence on record of secondary considerations of

3   non-obviousness for our consideration.

4   PRINCIPLES OF LAW

5   *Obviousness*

6   A claimed invention is unpatentable if the differences between it and

7   the prior art are "such that the subject matter as a whole would have been

8   obvious at the time the invention was made to a person having ordinary skill

9   in the art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007); *Graham*

10   *v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

11   In *Graham*, the Court held that that the obviousness analysis is

12   bottomed on several basic factual inquiries: "[(1)] the scope and content of

13   the prior art are to be determined; [(2)] differences between the prior art and

14   the claims at issue are to be ascertained; and [(3)] the level of ordinary skill

15   in the pertinent art resolved." *Graham*, 383 U.S. at 17. *See also KSR*, 550

16   U.S. at 406. "The combination of familiar elements according to known

17   methods is likely to be obvious when it does no more than yield predictable

18   results." *KSR*, 550 U.S. at 416.

19

20   ANALYSIS

21   *Claims 1-4, 6-15, 17-26, and 28-30 rejected under 35 U.S.C. § 103(a) as*

22   *unpatentable over Cidon and Taniguchi*

23   The Examiner found that Cidon describes all of the limitations of claim

24   1, except for the limitation of how a high priority is assigned (Ans. 3-4).

1   The Examiner found that Taniguchi describes this limitation (Ans. 4). The

2   Examiner found that a person with ordinary skill in the art would have

3   recognized the benefit of more effectively distributing audio and video by

4   determining how to assign high priority to packets (Ans. 4).

5   The Appellant contends that Cidon and Taniguchi fail to describe

6   limitations [2] – [5] of claim 1 (App. Br. 13). We disagree with the

7   Appellant. Limitations [2] – [5] require determining and identifying which

8   of two types of packets takes more time to process and then transmitting the

9   packet that takes less time to process before the other. Cidon describes a

10 preemptive packet transmission protocol that requires that high priority

11 packets are sent before low priority packets (FF 02). That is, Cidon

12 describes a process that differentiates a first packet type with a high priority

13 from a second packet type with a low priority and transmits the high priority

14 packets before the low priority packets.

15   Cidon fails to describe the limitation of determining which type of

16 packet takes more time to process, as required by limitation [2]. This

17 deficiency in Cidon is noted by the Examiner (Ans. 4). Taniguchi describes

18 a data transmission system that assigns a priority to packets to determine

19 their transmission (FF 03 and FF 04). Taniguchi also describes that priority

20 values for packets are assigned from a small value to a large value and

21 discrimination levels determine whether packets are transmitted or not (FF

22 04). Taniguchi further describes that further discrimination can be done

23 based on packet size, the number of transmitted bytes, and the value Bpc (FF

24 04). A person with ordinary skill in the art would have understood

25 differentiating packets by packet size and the number of transmitted bytes is

26 effective accounting for a duration of processing time. The size of a packet

1   is directly describes the amount of time it would take to transmit or process

2   the entire packet.

3   As such, Taniguchi describes separating packets by size and the number

4   of transmitted bytes and assigning a priority to the packets and Cidon

5   describes transmitting higher priority packets before lower priority packets.

6   Therefore, the combination of Cidon and Taniguchi describe claim 1.

7   The Appellant additionally contends that Taniguchi fails to describe

8   what is done with the recited information (*i.e.* which packets are abandoned

9   and which packets are sent) and Cidon has the same deficiency because

10   Cidon fails to describe how the discrimination is done (whether packets with

11   larger packet sizes are abandoned or whether packets with smaller sizes are

12   abandoned) (App. Br. 13). We disagree with the Appellant. As discussed

13   *supra*, Cidon and Taniguchi describe that smaller value packets are higher

14   priority and are transmitted before low priority packets. The Appellant is

15   attacking Cidon for deficiencies described by Taniguchi (determining which

16   type of packet takes more time to process) and is attacking Taniguchi for

17   features described by Cidon (transmitting higher priority packets before

18   lower priority packets). Nonobviousness cannot be established by attacking

19   the references individually when the rejection is predicated upon a

20   combination of prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d

21   1091, 1097 (Fed. Cir. 1986).

22   The Appellant has not sustained the burden of showing that the

23   Examiner erred in rejecting claims 1-4, 6-15, 17-26, and 28-30 under 35

24   U.S.C. § 103(a) as unpatentable over Cidon and Taniguchi.

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1   CONCLUSIONS OF LAW

2   The Appellant has not sustained the burden of showing that the

3 Examiner erred in rejecting claims 1-4, 6-15, 17-26, and 28-30 under 35

4 U.S.C. § 103(a) as unpatentable over Cidon and Taniguchi.

5

6   DECISION

7   To summarize, our decision is as follows.

8   •   The rejection of claims 1-4, 6-15, 17-26, and 28-30 under 35 U.S.C.

9   § 103(a) as unpatentable over Cidon and Taniguchi is not sustained.

10

11   No time period for taking any subsequent action in connection with this

12 appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

13

14   <u>AFFIRMED</u>

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18 mev

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